



Fenwick Elliott

The construction & energy law specialists

Measures an adjudicator can take to protect against liability

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- Are you covered by Statute?
- What does the underlying contract say?
- What does your Dispute Adjudication Agreement say, if there is one?
- Do I understand what law applies and what that law means to me?
- Insurance



What do you need to protect against?

"If adjudication is to work, it is essential for the adjudicator to enjoy immunity from litigation. Otherwise, he will not be able to act quickly and expeditiously, but will be constantly looking over his shoulder, worrying about the prospect of a writ being issued by one of the parties who is aggrieved by the way in which he is proceeding. If we want swift adjudication, the adjudicator must have immunity."

Nick Raynsford, MP for Greenwich, London.



Statutory Protection – New South Wales, Australia

Section 30: Building And Construction Industry Security Of Payment Act 1999

Protection from liability for adjudicators and authorised nominating authorities:

“(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:

- (a) in exercising the adjudicator’s functions under this Act, or*
- (b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator’s functions under this Act.*

(2) No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith:

- (a) in exercising the nominating authority’s functions under this Act, or*
- (b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority’s functions under this Act.”*



Contractual Protection: Adjudication Rules: UK

TeCSA Adjudication Rules:

“32. *Neither TeCSA, nor its Chairman, nor deputy, nor the Adjudicator nor any employee or agent of any of them shall be liable for anything done or not done in the discharge or purported discharge of his functions as Chairman, deputy or Adjudicator (as the case may be) whether in negligence or otherwise, unless the act or omission is in bad faith.*”



Contractual Protection: Adjudication Rules: Germany

DIS Rules on Adjudication,
Section 29: Exclusion of liability:

“The adjudicator, the DIS, its officers and employees are only liable for intentional misconduct.”



International rules: FIDIC

General Conditions of Dispute Adjudication Agreement

- 3 Warranties: given by the adjudicator;
- 4 General Obligations of the adjudicator;
- 5 General Obligations of the Employer and Contractor who undertake that the DAB will not:

“be liable for any claims or anything done or omitted in discharge...of the Member’s functions, unless the act or omission is shown to have been in bad faith

[and agree to hold]

jointly and severally indemnify and hold the Member harmless against and from claims from which he/she is relieved from liability under the preceding paragraph.”

- 8 Default of the DAB



Confidentiality

TeCSA, UK:

“33. Unless the Parties otherwise agree the Adjudication and all matters arising in the course thereof are and will be kept confidential by the Parties except insofar as necessary to implement or enforce any decision of the Adjudicator or as may be required for the purpose of any subsequent proceedings.”

DIS, Germany:

“28.1 The adjudicators are obligated to keep secret documents and information which they have received from a party in the course of their activity as adjudicator and shall not forward them to third parties. The parties, the adjudicators and the persons at the DIS Main Secretariat involved in the administration of the adjudication proceedings shall maintain confidentiality towards all persons regarding the adjudication proceedings and, in particular, regarding the parties involved and the documents exchanged. Persons acting on behalf of any person involved in the proceedings shall be obligated to maintain confidentiality.”



Third Parties

ICE Adjudication Procedure, UK:

“7.2 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith, and any employee or agent of the Adjudicator is similarly protected from liability. The Parties shall save harmless and indemnify the Adjudicator and any employee or agent of the Adjudicator against all claims by third parties and in respect of this shall be jointly and severally liable.”



The DAB Agreement

- Does an agreement exist between the DAB and the parties?
- Can you impose your own terms and conditions?
- Can you limit liability? *Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd*
- What law applies?
- Are you sure local law doesn't apply?



Resigning

- Does your immunity remain?
- Payment?
- Will this encourage action against you?



Professional Indemnity Insurance

- Recommended
- Is it required by the contract?
- Is it required by your nominating body?
- Are you actually covered?
- Did you notify in time?



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Conclusions